



In the Matter Of

JOSEPH SKELLEY, JR.,

CASE NO. 95-SWD-0001

COMPLAINANT,

DATE: July 25, 1996

v.

**CONSOLIDATED FREIGHTWAYS,
CORP., d/b/a CF MOTORFREIGHT,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the employee protection provision of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1988) and regulations at 29 C.F.R. Part 24 (1995). The Administrative Law Judge (ALJ) held a full hearing, during which both parties were represented by counsel, and issued a Recommended Decision and Order (R. D. and O.) on October 10, 1995, that this matter be dismissed.

The record in this case has been thoroughly reviewed. We find that it fully supports the ALJ's findings and conclusions, set forth in a well-reasoned and comprehensive R. D. and O.^{2/}

^{1/} On April 17, 1996 Secretary's Order 2-96 was signed, delegating jurisdiction to issue final agency decisions under the environmental whistleblower statutes and the regulations at 29 C.F.R. Part 24 to the newly created Administrative Review Board (ARB). 61 Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the ARB now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization is also attached.

^{2/} The ALJ's analysis discussed a complainant's initial establishment of a *prima facie* case. R. D. and O. at 5-6. Since this case was fully tried on the merits, the ALJ's task was to weigh all the evidence and testimony and decide whether the Complainant had proved by a preponderance of the evidence that the Respondent intentionally discriminated against him because of his protected activity. Once the Respondent presented its
(continued...)

Remusat v. Bartlett Nuclear, Inc., Case No. 94-ERA-36, Sec. Fin. Dec. and Ord., Feb. 26, 1996, slip op. at 2; *Stockdill v. Catalytic Industrial Maintenance Co., Inc.*, Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 2; *Miller v. Thermalkem, Inc.*, Case No. 94-SWD-1, Sec. Fin. Dec. and Ord., Nov. 9, 1995, slip op. at 1; *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Fin. Dec. and Ord., July 25, 1995, slip op. at 1-2; *Daugherty v. General Physics Corp.*, Apr. 19, 1995, slip op. at 2.

Complainant Joseph Skelley, Jr. (Skelley) asserts that his employer, Respondent Consolidated Freightways Corp. (CF), subjected him to seven discriminatory warning letters on his job performance for reporting fumes to the Delaware Department of Natural Resources and Environmental Control on August 23, 1994, during the course of his various truck deliveries.^{3/} Earlier that day, Skelley phoned his supervisor Luther Grim, CF's Operations Manager at its Aston, Pennsylvania terminal, from Wilmington, Delaware, to inform Grim of an odor emanating from freight to be delivered to International Petroleum Corporation in Wilmington. Skelley informed Grim that there were no hazardous labels nor leakage involving this freight. After determining that the bill of lading and delivery receipt reflected the absence of hazardous materials notations, Grim obtained further verification of that fact from CF's Houston terminal dispatcher, who contacted the originating shipper. Grim thereupon specifically instructed Skelley to proceed directly to International Petroleum to deliver the odiferous shipment. After initially expressing his desire to return the freight to CF's terminal, a distance of twenty-five miles, Skelley agreed to Grim's directions to proceed to International Petroleum, a few miles away. Instead, he stopped at Brandywine Compounding to make another delivery. From there he phoned Grim and told him of

^{2/}(...continued)

rebuttal, the answer to the question whether the Complainant had presented a *prima facie* case was no longer particularly useful. *James v. Ketchikan Pulp Co.*, Case No. 94-WPC-4, Sec. Fin. Dec. and Ord., Mar. 15, 1996, slip op. at 3; *Cook v. Kidimula International, Inc.*, Case No. 95-STA-44, Sec. Fin. Dec. and Ord. of Dism., Mar. 12, 1996, slip op. at 2, n.3; *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dep. Sec. Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 7-8.

Further, the ALJ inadvertently stated that the Complainant established a *prima facie* case of unlawful retaliation by a preponderance of the evidence. R. D. and O. at 5. It is apparent from the ALJ's R. D. and O. in favor of the Respondent that he did not find that the Complainant proved his case by a preponderance of the evidence, which is the standard of proof necessary for the Complainant to prevail. *Jackson and Roskam v. Ketchikan Pulp Co.*, Case Nos. 93-WPC-007, 93-WPC-008, Sec. Fin. Dec. and Ord., Mar. 4, 1996, slip op. at 4-5; *Zinn and Morris v. Univ. of Missouri*, Case Nos. 93-ERA-34, 93-ERA-36, Sec. Fin. Dec. and Ord., Jan. 18, 1996, slip op. at 6-8, 18-19; *Daugherty v. General Physics Corp.*, Case No. 92-SDW-2, Sec. Fin. Dec. and Ord., Apr. 19, 1995, slip op. at 2.

^{3/} Skelley does not allege discriminatory retaliation for engaging in other forms of protected activity, such as making an informal and internal safety complaint or refusing to work because of a good faith, reasonable belief that working conditions are unsafe or unhealthful. See *Hermanson v. Morrison Knudsen Corp.*, Case No. 94-CER-2, ARB Fin. Dec. and Ord., June 28, 1996, slip op. at 5; *Stockdill v. Catalytic Industrial Maintenance Co., Inc.*, Jan. 24, 1996, slip op. at 2-3. Skelley's discrimination charge is addressed solely to CF's alleged retaliation for Skelley's notification to the state agency. Claimant's Proposed Findings of Fact and Conclusions of Law at 8-10, 12-14; Claimant's Memorandum of Law at 2, 4.

his desire to return to the terminal, but Grim instructed him again to deliver the freight immediately to International Petroleum.

Skelley then phoned the Delaware Department of Natural Resources and Environmental Control to report the odor. Various agency personnel, a fire engine and an ambulance appeared, and Skelley was interviewed by a radio reporter. Also at the scene were CF's Terminal Manager Dan McTyre and Account Manager Pat McKee, who, after getting off a car phone, stated, according to Skelley, "I'm not saying you didn't have a problem here, but you didn't have to call the environmental people." T. 31. McTyre testified that he did not hear McKee make that statement. T. 148. Skelley eventually delivered the freight to International Petroleum, where other environmental officials sampled the leaking fluid.

Upon returning to CF's terminal, Grim requested Skelley to provide a written statement of the day's events, but Skelley refused to do so. After Grim asked Skelley why he did not follow Grim's directions to proceed directly to International Petroleum, rather than stopping at Brandywine Compounding, Skelley became irate, shouted numerous outbursts of gross profanity at Grim and attempted to force him to smell a container of the purported liquid. Grim then informed Skelley that he would receive a warning letter for insubordination. R. D. and O. at 2-4.

This warning letter and six others challenged by Skelley as discriminatory are summarized by the ALJ as follows:

The following day, August 24, 1994, Grim issued four letters to Complainant for violating Respondent's Uniform Rules and Regulations (RX 15). The first letter was issued to Complainant for the profanity used with Grim (CX 6). The second letter was for Complainant's disobeying of orders when he refused to proceed directly to International Petroleum (CX 6). A third letter was issued to Complainant by Grim for a separate violation of work rules for failure to sign, date, or indicate the number of pieces delivered on a delivery receipt (CX 6). A final letter was issued to Complainant on August 24, 1994 for his failure to complete his Equipment Daily Inspection & Condition Report in violation of work rules (CX 6). Complainant received another letter on September 14, 1994 for backing his truck into a parked car (CX 6), and two letters were both issued to Complainant on September 20, 1994 for failure to get a good count of freight and failure to obtain a bill of lading (Tr. at 52; RX 1; CX 6).

R. D. and O. at 4-5. Skelley urges that the "obvious intent of these letters was to build a file against [him] in order to provide Respondent with an excuse to fire him." Claimant's Memorandum of Law at 4. Contrary to Skelley's assertions, we agree with the ALJ that CF established that it would have issued the disciplinary letters absent any protected activity. R. D. and O. at 6.

We agree with the ALJ that Skelley's poor work history with CF prior to his protected activity involved numerous warning letters similar to and consistent with those issued subsequent to his protected activity. R. D. and O. at 6. These prior disciplinary letters include: RX 4, Feb. 3, 1988, failure to properly protect a shipment from damage, resulting in units being refused due to

damage; RX 3, Oct. 12, 1988, “loud verbal disturbance . . . cantankerous verbal action . . . [failure] to follow the instructions to go to work”; RX 1,^{4/} Ex. 13, Dec. 7, 1990, failure to notify CF of his inability to work in a timely, prescribed manner; RX 5, Jan. 8, 1991, attendance record “totally unacceptable”; RX 1, Ex. 12, Jan. 12, 1991, backed his vehicle into a customer’s dock door; RX 2, May 20, 1991, “flagrant disobeying of orders” for failure to use an assigned tractor, rather than another which he had previously reported as having a mechanical defect; RX 6, Aug. 14, 1991, arrived late for assigned starting time; RX 1, Ex. 10, Oct. 17, 1991, failure to sign his timecard, violating rule on failure to complete reports and trip sheets properly; RX 1, Ex. 11, Oct. 17, 1991, failure to complete a run at the scheduled time without a satisfactory explanation; RX 7, Nov. 20, 1991, attendance record “totally unacceptable”; RX 8, May 25, 1993, failure to timely notify CF of his inability to report for work, “caus[ing] an entire load . . . to remain undelivered”; RX 9, Sept. 14, 1993, failure to timely notify CF of his inability to work, “caus[ing] us to hold the . . . run because we could not contact another driver”; RX 10, Sept. 21, 1993, arrived late for work, admitted that he “had been drinking,” asked manager whether he wanted him to resign, was informed that this was his decision and that if he did not correct his problems, the manager “would do everything in [his] power to remove [him] from [the] seniority list,” and since he never did quit, was warned for his failure to timely notify CF of his inability to report for work; RX 1, Ex. 9, Feb. 25, 1994, shortage in collections for failure to collect money from consignee upon delivery of freight; RX 12, Aug. 22, 1994, “caused unnecessary delay in our customers[’] outbound freight [and] cost CF . . . undue expense,” in violating work rule on inaccurate counting or careless loading or unloading; RX 13, Aug. 22, 1994, reporting late for work. See *Jopson v. Omega Nuclear Diagnostics*, Case No. 93-ERA-0054, Sec. Fin. Dec. and Ord., Aug. 21, 1995, slip op. at 8-10; *Rivers v. Midas Muffler Center*, Case No. 94-CAA-5, Sec. Fin. Dec. and Ord., Aug. 4, 1995, slip op. at 4-6; *St. Laurent v. Britz, Inc., Hydro Nuclear Services, Inc., and Omaha Public Power District*, Case No. 89-ERA-00015, Sec. Fin. Dec. and Ord., Oct. 26, 1992, slip op. at 3-4 (prior employment infractions as evidence of employers’ subsequent nondiscrimination).

Skelley admitted the various acts of misconduct in the warning letters at issue. T. 21-22, 38, 48-52, 71; R. D. and O. at 6. The record does not support his assertion that they involved incidents “for which no letters are usually given by the employer.” Claimant’s Memorandum of Law at 4.^{5/} Skelley’s own prior reprimands belie this assertion. Luther Grim’s testimony was clear and cogent

^{4/} Luther Grim trial deposition, stipulated as admissible by the parties and received in evidence. T. 67-68, 114-15.

^{5/} Skelley did not prove this assertion for any of the challenged reprimands. His testimony on driver discretion for route decisions in the trucking industry, T. 47 (August 24 reprimand for disobeying orders to proceed directly to International Petroleum), CF’s disciplinary practices on verbal disturbances, T. 48 (August 24 reprimand for profanity against Grim), and CF’s disciplinary practices for leaving freight, T. 53 (September 20 reprimand for inaccurate freight counting), is of little value because the record does not establish sufficient background or expertise for his views on the trucking industry or CF’s disciplinary practices. The record does not indicate that he was in any way involved in the processing or disposition of employee reprimands or had otherwise gained special knowledge which would enable him to speak with accuracy and authority on CF’S reprimand policies as applied to other employees. Management officials McTyre and Grim provided competent testimony indicating that Skelley’s reprimands were consistent with CF’s policies. T. 124-25, 138-39, 145; RX 1 at 12-16, 33, 40, 65.

regarding the nondiscriminatory, business-related reasons for his issuance of each of the challenged letters. RX 1 at 10-38, 53-77. None of the letters suggest that they were issued, in whole or in part, because of Skelley's protected activity.^{6/}

In sum, Skelley did not prove by a preponderance of the evidence that CF issued the warning letters for discriminatory reasons under the SWDA. Rather, the record shows that these letters were issued for legitimate, business-related and nondiscriminatory reasons to a marginal employee.

Accordingly, we adopt the ALJ's recommendation that this case be DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

^{6/} Regarding Skelley's August 24 reprimand for gross profanity towards Grim, we note that even when an employee has engaged in protected activities, employers may legitimately discipline them for insubordinate behavior and disruption. *Dunham v. Brock*, 794 F.2d 1037, 1041(5th Cir. 1986); *Oliver v. Hydro-Vac Services, Inc.*, Case No. 91-SWD-00001, Sec. Dec. and Ord. of Rem., Nov. 1, 1995, slip op. at 17-18; *Carter v. Electrical District No. 2 of Pinal County*, Case No. 92-TSC-11, Sec. Dec. and Ord. of Rem., July 26, 1995, slip op. at 19-21; *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec. and Ord., Dec. 1, 1994, slip op. at 8-9.